

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

<b>DINO N. THEODORE</b>	)	
<b>and ACCESS WITH SUCCESS, INC.,</b>	)	
<b>Plaintiffs</b>	)	<b>CASE NO.: 1:13-cv-162JD</b>
	)	
<b>v.</b>	)	
	)	
<b>TMT SALEM PARK PLAZA, INC.,</b>	)	
<b>Defendant</b>	)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO RE-OPEN CASE**

The plaintiffs, Dino N. Theodore and Access with Success, Inc., have moved the Court pursuant to Fed. R. Civ. P. 60 (b)(1) to re-open this case on grounds that it was terminated on May 8, 2013 due to a filing error by plaintiffs' counsel.

**I. BACKGROUND**

On April 5, 2013, the plaintiffs filed this case against TMT Salem Park Plaza, Inc. under Title III of the Americans with Disabilities Act. The subject property is 125 South Broadway, Route 28 in Salem, NH, which is a 37,933 square foot shopping center known as "Salem Park Plaza." Salem Park Plaza's tenants include Barnes & Noble, Pier 1 Imports, Jos. A. Bank, T-Mobile, Findeisen's Ice Cream, and a Bank of America ATM kiosk. The plaintiffs alleged, *inter alia*, that the property does not conform to the 2010 ADA Standards for Accessible Design with regard to parking and initial access into the building. The plaintiffs sought injunctive relief to compel the property owner to remove architectural barriers to wheelchair access at Salem Park Plaza.

In researching property ownership, counsel determined that TMT Salem Park Plaza, Inc. owned the real property based upon official records available through the Town of Salem Assessing Department. On May 7, 2013, after having served the Summons and Complaint upon

TMT Salem Park Plaza, Inc., counsel received a letter from a Chicago lawyer representing TMT Salem Park Plaza, Inc. The lawyer wrote that TMT Salem Park Plaza, Inc. sold and conveyed the subject property on January 15, 2013 and requested a voluntary dismissal. Plaintiffs' counsel verified this information by researching the Rockingham County Registry of Deeds. In addition to learning that Assessing Department information can be outdated plaintiffs' counsel learned that the new owner of the subject property is Linear Retail Salem #2, LLC. The proper defendant is Linear Retail Salem #2, LLC.

In response to this new information, plaintiffs' counsel drafted three separate pleadings: (1) a Notice of Amendment of Complaint, (2) an Amended Complaint, and (3) a Notice of Voluntary Dismissal as to Defendant, TMT Salem Park Plaza, Inc. The intention was to file and docket the three pleadings in the order listed above. By miscommunication and mistake on the part of plaintiffs' counsel, the Notice of Voluntary Dismissal was filed first. This misstep automatically resulted in termination of the case. As stated in LR 5.4, a paper filed by electronic means "constitutes entry of the pleading or other paper on the docket kept by the clerk." The plaintiffs respectfully request that the Court, in its discretion, will undo this error as permitted under Fed. R. Civ. P. 60(b)(1) and re-open the case.

## **II. APPLICABLE LAW**

The relevant language within Fed. R. Civ. P. 60 is as follows:

"(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect[.]"

### **III. CONCLUSION**

The Court should relieve the plaintiffs and their legal representative from an order entered due to their filing mistake. The plaintiffs respectfully request that the Court will re-open this case. By separate motion, the plaintiffs will request leave to amend their complaint by substituting the proper defendant, Linear Retail Salem #2, LLC, for TMT Salem Park Plaza, Inc.

WHEREFORE the plaintiffs pray that their motion will be granted.

Respectfully submitted,  
The Plaintiffs, DINO THEODORE, et al.,

By their Attorneys,

/s/Nicholas S. Guerrero

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Dated: May 9, 2013